

## Advertisements Under 804(c) of the Fair Housing Act - Jan. 9, 1995

*Housing and Urban Development*

*Washington, D.C. 20410-2000*

*January 9, 1995*

MEMORANDUM FOR: FHEO Office Directors, Enforcement Directors, Staff, Office of Investigations, Field Assistant General Counsel

FROM: Roberta Achtenberg, Assistant Secretary for Fair Housing and Equal Opportunity, E

SUBJECT: Guidance Regarding Advertisements Under 804(c) of the Fair Housing Act

The purpose of this memorandum is to provide guidance on the procedures for the acceptance and investigation of allegations of discrimination under Section 804(c) of the Fair Housing Act (the Act) involving the publication of real estate advertisements. (This memorandum does not address fair housing issues associated with the publication of advertisements containing human models, and does not address 804(c) liability for making discriminatory statement.)

Recently, the number of inquiries involving whether or not potential violations of the Act occur through use of certain words or phrases has increased, and these issues cannot, in some situations, be answered by referring to decided cases alone. In some circumstances, the Advertising Guidelines, published at 24C.F.R. Part 109, have been interpreted (usually by persons outside of HUD) to extend the liability for advertisements to circumstances which are unreasonable.

This guidance is meant to advise you of the Department's position on several of these issues.

Previous guidance already requires that Intake staff review a potential complaint, gather preliminary information to ascertain whether the complaint states a claim under the Act, and consult with counsel on any legally questionable matters before the complaint is filed. Likewise, jurisdictional issues such as standing and timeliness should also be established prior to filing.

If the Advertising Guidelines, this memorandum, or a judicial decision clearly indicate that the language used in the advertisement is a potential violation of Section 804(c) and the criteria for establishing jurisdiction are met, the complaint should be filed and processed. Any complaint concerning an advertisement which requires an assessment of whether the usage of particular words or phrases in context is discriminatory, requires the approval of Headquarters FHEO before a complaint is filed. If the advertisement appears to be discriminatory, but the Advertising Guidelines, this memorandum, or a Judicial decision do not explicitly address the language in question, supervisory staff must also obtain approval of

Headquarters FHEO before the complaint is filed. Potential complaints regarding advertisements which do not meet the above descriptions should not be filed.

Where there is a question about whether a particular real estate advertising complaint should be filed, relevant information regarding the factual and/or legal issues involved in the complaint should be gathered, and counsel should be consulted prior to contacting the potential respondent publisher. The matter should then be referred to the Office of Investigations for review. Such referrals may take the form of a short memo, reciting the applicable advertisement language, and any factual or legal analysis which is appropriate.

Section 804(c) of the Act prohibits the making, printing and publishing of advertisements which state a preference, limitation or discrimination on the basis of race, color, religion, sex, handicap, familial status, or national origin. The prohibition applies to publishers, such as newspapers and directories, as well as to persons and entities who place real estate advertisements. It also applies to advertisements where the underlying property may be exempt from the provisions of the Act, but where the advertisement itself violates the Act. See 42 U.S.C. 3603 (b).

Publishers and advertisers are responsible under the Act for making, printing, or publishing an advertisement that violates the Act on its face. Thus, they should not publish or cause to be published an advertisement that on its face expresses a preference, limitation or discrimination on the basis of race, color, religion, sex, handicap, familial status, or national origin. To the extent that either the Advertising Guidelines or the case law do not state that particular terms or phrases (or closely comparable terms) may violate the Act, a publisher is not liable under the Act for advertisements which, in the context of the usage in a particular advertisement, might indicate a preference, limitation or discrimination, but where such a preference is not readily apparent to an ordinary reader. Therefore, complaints will not be accepted against publishers concerning advertisements where the language might or might not be viewed as being used in a discriminatory context.

For example, Intake staff should not accept a complaint against a newspaper for running an advertisement which includes the phrase female roommate wanted because the advertisement does not indicate whether the requirements for the shared living exception have been met. Publishers can rely on the representations of the individual placing the ad that shared living arrangements apply to the property in question. Persons placing such advertisements, however, are responsible for satisfying the conditions for the exemption. Thus, an ad for a female roommate could result in liability for the person placing the ad if the housing being advertised is actually a separate dwelling unit without shared living spaces. See 24 CFR 109.20.

Similarly, Intake staff should not file a familial status complaint against a publisher of an advertisement if the advertisement indicates on its face that it is housing for older persons. While an owner-respondent may be held responsible for running an advertisement indicating

an exclusion of families with children if his or her property does not meet the "housing for older persons" exemption, a publisher is entitled to rely on the owner's assurance that the property is exempt.

The following is policy guidance on certain advertising issues which have arisen recently. We are currently reviewing past guidance from this office and from the Office of General Counsel and will update our guidance as appropriate.

1. Race, color, National origin. Real estate advertisements should state no discriminatory preference or limitation on account of race, color, or national origin. Use of words describing the housing, the current or potential residents, or the neighbors or neighborhood in racial or ethnic terms (i.e, white family home, no Irish) will create liability under this section.

However, advertisements which are facially neutral will not create liability. Thus, complaints over use of phrases such as master bedroom, rare find, or desirable neighborhood should not be filed.

2. Religion. Advertisements should not contain an explicit preference, limitation or discrimination on account of religion (i.e. no Jews, Christian home). Advertisements which use the legal name of an entity which contains a religious reference (for example, Roselawn Catholic Home), or those which contain a religious symbol, (such as a cross), standing alone, may indicate religious preference. However, if such an advertisement includes a disclaimer (such as the statement "This Home does not discriminate on the basis of race, color, religion, national origin, sex, handicap or familial status") it will not violate the Act. Advertisements containing descriptions of properties (apartment complex with chapel), or services (kosher meals available) do not on their face state a preference for persons likely to make use of those facilities, and are not violations of the Act.

The use of secularized terms or symbols relating to religious holidays such as Santa Claus, Easter Bunny, or St.Valentine's Day images, or phrases such as Merry Christmas, Happy Easter, or the like does not constitute a violation of the Act.

3. Sex. Advertisements for single family dwellings or separate units in a multi-family dwelling should contain no explicit preference, limitation or discrimination based on sex. Use of the term master bedroom does not constitute a violation of either the sex discrimination provisions or the race discrimination provisions. Terms such as "mother-in-law suite" and "bachelor apartment" are commonly used as physical descriptions of housing units and do not violate the Act.

4. Handicap. Real estate advertisements should not contain explicit exclusions, limitations, or other indications of discrimination based on handicap (i.e., no wheelchairs). Advertisements containing descriptions of properties (great view, fourth-floor walk-up, walk-in closets), services or facilities (jogging trails), or neighborhoods (walk to bus-stop) do not violate the

Act. Advertisements describing the conduct required of residents ("non-smoking", "sober") do not violate the Act. Advertisements containing descriptions of accessibility features are lawful (wheelchair ramp).

5. Familial status. Advertisements may not state an explicit preference, limitation or discrimination based on familial status. Advertisements may not contain limitations on the number or ages of children, or state a preference for adults, couples or singles. Advertisements describing the properties (two bedroom, cozy, family room), services and facilities (no bicycles allowed) or neighborhoods (quiet streets) are not facially discriminatory and do not violate the Act.

Please contact Sara R. Pratt, Director, Office of Investigations or Susan Forward, Deputy Assistant Secretary for Enforcement and Investigations, for further information.